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No. 92-1964

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. Respondent "recognizes" that other courts of appeals have "deferred to the Board's approach" that a nurse's direction to less-skilled employees in the exercise of professional judgment does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (the Act), 29 U.S.C. 152(11). Br. in Opp. 4. Respondent also "agrees" that the Sixth Circuit has rejected that aspect of the Board's standard for determining whether a nurse is a supervisor. *Ibid.* Nevertheless, respondent urges this Court to leave the conflict unresolved. Respondent suggests that the issue is not squarely presented here, because, even if the court of appeals incorrectly held that the nurses in this case

are supervisors by virtue of directing nurses' aides, the nurses could be found to be supervisors under another branch of Section 2(11) because they "play a crucial role in the disciplinary and evaluative processes in the facility."[1] Br. in Opp. 5.

That suggestion is incorrect; respondent's purported alternative basis for treating the nurses as supervisors is unsupported by the record and findings in this case. The administrative law judge (ALJ) considered each of the areas of the nurses' activity on which respondent relies (Br. in Opp. 5-6)—counseling nurses' aides; participating in evaluations; and recommending rewards and disciplinary measures—and, after extensive discussion, the ALJ rejected the claim that those activities add up to discipline or evaluation under the Act.

While the ALJ found that a nurse at respondent's facility may use a counseling form to note problems concerning the aides' work performance, he further found that the "record contains no indication that the counseling forms that the nurses drafted have ever had a deleterious impact on any aide." Pet. App. 44a. And, while the ALJ found that "nurses routinely report problems about an aide's work or attendance" to superiors, the "[n]urses themselves do not penalize any aide or threaten any aide with future penalties," and "with only minor exception the nurses do not recommend that any aide be penalized." *Id.* at 44a-45a. Finally, the ALJ found that the nurses did not have anything to do with the aides' performance appraisals until February 1989, and even then, the nurses' involvement was episodic and superficial. *Id.* at 45a-46a. Respondent did not solicit

[1] The Act's definition of supervisor includes employees who have authority "to hire, transfer, suspend, lay off, recall, promote, discharge, * * * reward, or discipline other employees." 29 U.S.C. 152(11).

or desire the nurses' recommendations, but in fact told them "*not* to answer the forms' ultimate questions—about 'overall evaluation' and whether or not to 'recommend continued employment.'" *Id.* at 45a. After the nurses completed and signed their parts of the forms, they "turned them in to one of their superiors" and "did not participate in the meeting between each aide and the administrator or [director of nursing] at which the performance appraisal was discussed." Nor was there a showing that a nurse's low performance appraisal "ever leads to the discharge of an aide, or to the threat of discharge." *Ibid.*

Based on those findings, the ALJ concluded that respondent's nurses have no authority to "discipline" employees, to "discharge" them, or "effectively to recommend such action," as those terms are used in Section 2(11) of the Act. Pet. App. 46a.[2] The Board affirmed those findings and conclusions of the ALJ, *id.* at 12a, and the court of appeals did not disturb them.

Against that background, respondent is incorrect in arguing that the "questions presented by the petition are 'purely artificial and hypothetical.'" Br. in Opp. 6. The crux of the court of appeals' decision is its rejection of the Board's established rule that a nurse's assignment and direction of the work of lesser-skilled aides, in the exercise of professional judgment and incidental to the

[2] The ALJ did not "ignore[]" the nurses' job description or the ratio of employees to supervisors in the nursing department if the nurses are not supervisors. Br. in Opp. 5 n.4; see also *id.* at 9 n.9. But the ALJ went beyond the nurses' job description and determined that, in fact, the authority that the nurses had over the aides was not sufficient to meet the Section 2(11) criteria for supervisory status. Pet. App. 37a-46a. And the ALJ noted that specific ratios are not dictated by the Act and they cannot overcome other evidence that is inconsistent with supervisory status. *Id.* at 48a.

nurses' treatment of patients, does not transform the nurses into supervisors under the Act. Pet. App. 8a-10a. The court gave no other basis for overturning the Board's ruling, and there is none in the record. Accordingly, the legal issue raised by our petition is concretely presented for review in this case.[3]

2. On the merits, respondent contends (Br. in Opp. 7-8) that the Board's approach to determining the supervisory status of nurses would exclude any professional from supervisory status and that the Board's test rests on arguments similar to those that were rejected by the Court in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980). Those contentions do not bear on the appropriateness of this case for certiorari, and, in any event, reflect a misreading of *Yeshiva*.

Contrary to respondent's contention (Br. in Opp. 9), the Board's rule would not exclude "all but a few health care workers from supervisory status." The Board will find nurses to be supervisors where, in addition to performing their professional duties and responsibilities, they also possess the authority to affect the job status or pay of employees working under them. See Pet. 12-15 and n.7.[4]

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[3] Both the Sixth and Seventh Circuits have acknowledged the circuit conflict on that issue. See *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548, 1549 (6th Cir. 1992) (noting there that there is "some tension within the caselaw in this area"); *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). Although respondent claims (Br. in Opp. 9 n.10) that the conflicting cases are "distinguishable on their facts from this case," it makes no effort to draw those distinctions, and, more importantly, admits that there is a conflict over the governing legal principles.

[4] In passing, respondent also suggests (Br. in Opp. 7 n.7) that the Board did not raise in the court of appeals "the interplay between the Act's coverage of professional employees and its exclusion of supervisors." That is incorrect. The Board noted that, in directing others' work, a health care employee acts in accordance with professional training and norms for the provision of care in the best interest of the patients; that the Board has, accordingly, consistently avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients; that Congress approved of the Board's approach in enacting the 1974 health care amendments to the Act; and that the Court likewise approved of that approach in *Yeshiva*. Board C.A. Br. 18-20.

Nor is there merit to respondent's reliance on *Yeshiva*. There, the Court found that certain university professors were managers, and thus not entitled to the Act's protections for employees, despite the Board's contrary conclusion. Respondent notes (Br. in Opp. 8) that the Court rejected the Board's contention in *Yeshiva* that, in formulating and making policy for the university, the faculty members acted primarily in their own professional interest and not in the interest of their employer. Respondent overlooks, however, the Court's acknowledgment that "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974). Accordingly, far from rejecting the rule that the Board has applied here, *Yeshiva* lends support to the validity of that rule. To the extent there is any question about that reading of *Yeshiva*, this Court should resolve the issue and should hold that *Yeshiva* is consistent with the Board's approach to supervisory issues in the health care field.

3. Respondent contends (Br. in Opp. 10) that, since the allocation of the burden of proof was not determinative in this case, it is not an appropriate issue for review here.

Review of the burden of proof issue is nevertheless warranted because it has divided the courts of appeals and because the Sixth Circuit has indicated that its position will govern future cases reviewed in that circuit. See Pet. 19-22.

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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